

1 The stream restoration plan, combined with the civil engineering expense and exclusive of
2 earthwork costs, have been projected cost between approximately \$60,994 and \$66,994.² Shortly after
3 hearing this news, the market crashed, and along with it, the Moritzes' savings that had been used to
4 fund this suit. The value of their home plummeted, and their equity and ability to borrow against it
5 vanished. They became unable to complete the payment to the geotechnical firm, and have paid
6 \$10,000 of the more than \$20,000 billed to date. Notwithstanding an active civil lawsuit by the City of
7 Poway, the Moritzes' homeowners insurance carrier twice orally denied obligations of defense and of
8 indemnity, and on January 22, 2008 denied obligations of defense and indemnity, leaving the Moritzes
9 without the their own and with their insurer's resources to perform the engineering and corrective work
10 desired by RWQCB and by the City of Poway.

11 In December 2008, the City of Poway sought and obtained an abatement warrant relating to
12 sediment control and erosion-control measures. Under the authority of the abatement warrant, the City
13 installed a plastic creek with gravel-bag energy dissipaters along its length. (Exhibit 15.) Beyond the
14 authority of the abatement warrant, the City punctured, removed and otherwise destroyed a large portion
15 of the drainage pipe, making it unsalvageable. The plastic creek the City of Poway installed, of course,
16 performs the very same function that Bill Moritz envisioned with his 24 inch pipe: convey storm water
17 from the northerly boundary of the Moritz property to the southerly boundary without scouring the
18 property.

19 Purportedly under the authority of Water Code section 13304, the RWQCB issued tentative order
20 R9-2008-0152 which commands a specific design for the Moritz property:

21 [C]leanup and abate the existing and threatened pollution associated with the
22 unauthorized discharge of waste on your property by:

- 23 a. Removing the waste including sand, silt, Clay, rock or other earthen materials
24 previously discharged two waters of the State;
25 b. Restoring the elevations of the stream channel bottom and banks and floodplain to
26 pre-discharge conditions;
27 c. Realigning the stream channel to its pre-discharge location;

28 ² Exclusive of attorneys fees.

- 1 d. Revegetating the restored stream with native vegetation along the banks in a
2 manner to mimic the diverse and distribution of streams in the vicinity of the affected
3 area;
4 e. Removing the 24-inch HDPE drainage pipe and other associated structures; and
5 f. Removing the waste including sand, silt, clay, rock or other materials stored on
6 land where it threatens to discharged to waters of the State.

7 For the reasons set forth below, the Moritzes seek the relief requested.

8 **THE REGIONAL BOARD SHOULD REFUSE TO ADOPT ORDER**
9 **R9-2008-0152 BECAUSE IT HAS NOT TAKEN INTO ACCOUNT ECONOMIC**
10 **CONSIDERATIONS OR THE DISCHARGERS' RESOURCES**

11 The RWQCB must, but has not, considered economic issues or the dischargers' resources.

12 California Water Code section 13241 (d) requires regional boards to take economic considerations into
13 account when establishing water quality objectives in water quality control plans. This RWQCB's own
14 Basin Plan requires of the regional board no less — the board must take into account economic
15 considerations in establishing water quality objectives.³

16 "Water quality objectives," of course, "means the limits or levels of water quality constituents or
17 characteristics which are established for the reasonable protection of beneficial uses of water or the
18 prevention of nuisance within a specified area." Water Code section 13050 (h). In other words, the
19 water quality objectives here are the qualities of the water that the tentative CAO is designed to protect.

20 The tentative CAO and its findings are silent on whether the RWQCB addressed economic
21 considerations in setting water quality objectives to be achieved by its tentative CAO. In fact, those
22 issues were not even addressed, nor has other evidence been presented suggesting that the regional board
23 considered or addressed economic issues. Christopher Means testified in deposition:

24 Q Did you ever consider economic
25 considerations of the Moritzes in preparing the
26 cleanup and abatement order that was proposed?

27 A No.

28 Q How about in the preparation of the
previous cleanup and abatement order?

³ The phrase "basin plan," refers to the document entitled "WATER QUALITY CONTROL PLAN FOR THE SAN DIEGO BASIN (9) SEPTEMBER 8, 1994 (with amendments effective prior to April 25, 2007). Pursuant to 23 CCR § 648.3 this exhibit is offered by reference.

1 A No.

2 Q Do you know whether the regional board, in
3 setting its water quality objectives, took into
4 account any economic considerations?

5 MR. LEON: I'm going to object to that as
6 irrelevant and not likely to lead to any relevant
7 information. It doesn't have anything to do with the
8 case.

9 THE WITNESS: And I don't understand your
10 question.

11 But economic considerations are relevant. California Water Code section 13241 (d) requires
12 economic considerations to be taken into account when setting water quality objectives. RWQCB
13 promises the public in its Basin Plan that the regional board must consider economic considerations in
14 establishing water quality objectives.⁴ (Exhibit 16.) But the record is devoid of evidence demonstrating
15 compliance with that requirement.

16 RWQCB again in the Basin Plan promises the public that RWQCB will consider the financial
17 resources of the discharger in selecting enforcement action.⁵ Moreover, this RWQCB must also take
18 into account a discharger's resources in determining schedules for investigation, cleanup and abatement.
19 23 CCR section 2907 IV.

20 But here, RWQCB has done little to nothing to demonstrate consideration of economic issues or
21 of the dischargers' resources. This failure to take into account economic considerations and the
22 dischargers' resources comes at a time of catastrophic, unprecedented bank failures, crashing markets,
23 destruction or elimination of values of retirement and savings accounts, and the worst recession since the
24 Great Depression.

25 In light of all of those terrible economic considerations, the following is the extent of the
26 RWQCB deliberation of the issue of economics and the dischargers' financial resources, all of which
27 issues are not addressed in any of the findings set forth in the tentative order as drafted. Chris Means,
28 staff member of the RWQCB, testified:

⁴ Basin Plan at pages 3-1 to 3-2. Pursuant to 23 CCR § 648.3 this exhibit is offered by reference.

⁵ Basin Plan at pages 4-24. Pursuant to 23 CCR § 648.3 this exhibit is offered by reference.

1 Q How about the next bullet point? Does the regional board have any evidence as to
the financial resources of Bill Moritz or Lori Moritz?

2 A Yes.

3 Q What evidence does it have?

4 A What you have provided. And in regards to costs of creating the plan, though I've
never seen an invoice that proves that, I have – and you've also stated what you expect, or
a bid you've had for what it would cost to do the actual restoration work.

5 Q So at this point it has no actual dollar costs for what it would cost to do the work,
correct?

6 MR. LEON: Asked and answered.

7 THE WITNESS: I believe you stated in a letter or correspondence to me that it would
cost 60,000.

8 BY MR. SIMPSON:

9 Q Do you have any information about the financial ability of the Moritzes?

10 A I do not.

11 Q Does anybody within the RWQCB?

12 A I don't know.⁶

13 As set forth above and as will be presented at the time of the hearing herein, the Moritzes are
14 without the financial resources to achieve RWQCB's requested compliance. The projected costs are
15 expected to be a minimum of \$60,000-\$68,000, exclusive of earthwork costs, exclusive of third-party
16 biologist costs for a biological assay, if necessary, and exclusive of attorneys' fees. Simply put, the
17 Moritzes cannot perform the restoration work.

18 The Moritzes have sought coverage from their own insurer. Their insurer has denied coverage.
19 Whether at some point in the future the insurer might change its perspective is currently unknown.

20 In an effort to achieve resolution, the Moritzes discussed with the City of Poway allowing the
21 City of Poway to perform the stream restoration itself, as a way to give the City and the RWQCB the
22 stream restored to their satisfaction at minimal cost. But the City indicated that it is "not in a position to
23 perform restoration work on the property," and the opportunity to achieve stream restoration at minimal
24 cost was lost.

25 The Moritzes are not recalcitrant homeowners. They simply lack the ability to comply with all
26 of the hurdles required. In fact, Bill Moritz's fault is that he is overly willing to immediately solve
27 problems such as the scouring and siltation that occurred on the Moritz property. But labor costs here
28 are a relatively small issue and do little to mitigate the overall engineering, permitting and related costs.

⁶ Deposition of RWQCB staff member Christopher Means at 105:6-106:3

1 The RWQCB tentative order should not issue as drafted because it fails to take into account economic
2 considerations and the dischargers' financial resources.

3
4 **CAO 2008-00152 SHOULD NOT ISSUE BECAUSE IT VIOLATES WATER CODE SECTION**
5 **13360 (A) BY IMPROPERLY DICTATING THE DESIGN, LOCATION, TYPE OF**
6 **CONSTRUCTION OR MANNER BY WHICH COMPLIANCE IS OBTAINED**

7 CAO R9-2008-0152 dictates the design, location, type of construction, and particular manner in
8 which compliance must be obtained. Water Code section 13360 (a) provides:

9 (a) No waste discharge requirement or other order of a regional board or the state
10 board or decree of a court issued under this division shall specify the design,
11 location, type of construction, or particular manner in which compliance may be
12 had with that requirement, order, or decree, and the person so ordered shall be
13 permitted to comply with the order in any lawful manner.

14 The tentative order states specifically that the Moritzes must restore the stream bed channel
15 bottom to particular elevation. Likewise, the banks and floodplain must be returned to the pre-discharge
16 elevations and conditions. The stream must be realigned to where it was in 2005. The stream must be
17 revegetated specifically to match other streams are in the vicinity. Far from giving the Moritzes latitude
18 in how they might comply, the tentative order as drafted specifies one certain design for a stream bed in
19 order to achieve compliance with the order — it must match what previously existed and only that
20 design is acceptable under the terms of the order.

21 With due respect to RWQCB staff, Christopher Means, who has always conducted himself
22 professionally during handling of this matter, he rightly admitted in deposition that the RWQCB
23 tentative order specifies the design by returning the stream to the exact design it had before any
24 alteration. "That's the point," he said. But he believes that the order does allow latitude in the method of
25 construction — whether the design goal is achieved by shovels versus bulldozers, for example. Thus he
26 stated:

27 Q In other words, part of the RWQCB, if adopts this, is telling the Moritzes how
28 to restore the stream by specifying the design. And that design is the
preexisting condition, right?

A Not exactly, no.

Q How does it differ?

1 A We are requesting that the stream be restored, and then elements of the
2 restoration that are necessary to have that happen, to have the stream restored
3 to its pre-project configuration are here. How that's to be done -- we're not
prescribing how it's to be done. We're prescribing what's required to restore
the creek.

4 Q When you're saying you're not prescribing how it's to be done, you mean that
he can use bulldozers versus shovels? That's his choice? What do you mean?

5 A I mean, yes, the way he goes about it is up to him.

6 Q But the design must be the same design as it existed before he did any work,
correct?

7 A That's the point, yes.⁷

8 Ordering the Moritzes to entirely restore the stream either to 2005 or to exact pre-discharge
9 conditions specifies the exact design of the stream. This is directly contrary to Water Code section
10 13360, which permits latitude in how compliance with water-quality objectives can be achieved. The
11 Regional Board should refuse to issue the CAO as drafted, and allow compliance with water quality
12 objectives in any lawful manner.

13
14 **THE REGIONAL BOARD SHOULD REFUSE TO ISSUE CAO R9-2008-0152**
15 **BECAUSE IT FAILS TO NAME OTHER DISCHARGERS**
INCLUDING THE CITY OF POWAY

16 The state policy for water quality control, specifically for cleanup and abatement orders issued
17 under Water Code section 13304, requires that regional boards "name other dischargers as permitted by
18 law." As set forth above, Bill Moritz exerted efforts at contour grading of his property, and ultimately
19 installing the pipe in order to protect his property from uncontrolled upgradient storm waters. The
20 Crocker Road culvert and the Rattlesnake Creek tributary that bisects the Moritzes property are within
21 the City of Poway's storm water jurisdiction. The City of Poway, as a subpermittee of the RWQCB's
22 NPDES permit, per order R9-2007-0001, has a mandatory duty to properly manage storm water. But
23 during storm events of significance, silt-and-sediment laden water, together with other debris, have been
24 deposited onto the Moritzes' property. The Moritzes are informed and believe that the City of Poway

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27 ⁷ Christopher Means deposition taken January 16, 2008, at pages 52:19-53:15. (Exhibit 20.) This is a certified copy, but an
28 as-yet unsigned transcript of Christopher Means' deposition, usable by agreement of counsel. The Moritzes request the
opportunity to augment the record with certified and ultimately with signed deposition transcripts, which are unavailable as
of this writing.

1 has failed to properly manage storm water, for example, by failing to clean out the 14 inch culvert
2 passing beneath Crocker Road which has become clogged with debris. (Exhibit 17.)

3 Storm water during significant rain events consequently flows down Crocker Road over the
4 surface of the street into the neighboring properties. (Exhibit 18.) The neighboring properties are
5 devoid of vegetation, so storm-water flows pick up vast quantities of silt and sediment before flowing
6 onto the Moritzes' property but there have been no recent City of Poway erosion-control enforcement
7 activities on such properties. The storm water picks up sediment, silt and debris, then deposits it onto
8 the Moritzes' property, a condition of nuisance or pollution for which RWQCB should hold the City of
9 Poway responsible.

10 Title 23 of the California Code of Regulations, section 2907 II provides that the regional Board
11 must name other dischargers as permitted by law. That regulation states: "The Regional Water Board
12 shall . . . Name other dischargers as permitted by law"

13 This board's tentative order seeks to name the Moritzes as dischargers because of sediment
14 leaving or potentially leaving their property, suggesting that sediment is a condition of pollution or
15 nuisance for which dischargers ought to be held liable. The logical result of course is that those very
16 same conditions of pollution or nuisance should require RWQCB to name other upgradient dischargers
17 or persons responsible for the condition of pollution or nuisance — here, the City of Poway, and perhaps
18 others. The language of the regulation set forth in 23 CCR section 2907 II is mandatory given the use of
19 the word "shall." Consequently, this board must name other dischargers, and should not adopt tentative
20 CAO R0-2008-0152 without such dischargers.

21 Moreover, the City of Poway gave conflicting instructions to Bill Moritz about how or whether
22 his contour grading was proper. Referring to discussions that Bill Moritz had with City of Poway
23 Inspector Dave Rizzuto in January 2008, Mr. Rizzuto testified as follows in his January 22 deposition⁸:

24 Q. Did Bill Moritz tell you that he had already been
25 to the city of Poway asking whether a permit was required
26 for the work that he envisioned?

27 A. I believe --

28 ⁸ The deposition of Dave Rizzuto (Exhibit 19) at this point is a rough transcript. The Moritzes request leave to augment the record with certified copies and/or original, signed transcripts when received.

1 MS. FOSTER: Objection. I'm sorry. That calls
2 for hearsay.

3 You can answer.

4 THE WITNESS: Okay. That I believe was
5 discussed, that he said he had been in contact with the
6 city at that point.

7 BY MR. SIMPSON:

8 Q. He told you that he'd actually been down to the
9 city?

10 A. I couldn't tell you his exact phrasing of it, but
11 that he expressed an understanding of the limitations of
12 the ordinance at it applied to the work he was doing.

13 Q. Did you issue any stop work notice or citation?

14 A. I did not.

15 Q. Why is that?

16 A. Again, because my opinion of the work that was
17 ongoing at that time was that it did not exceed the
18 criteria of the provisions for landscaping.⁹

19 Q. Did you tell him that it was okay to proceed as
20 long as he stayed within the confines of the grading
21 ordinance as you described it?

22 A. As it applies to landscaping, yes.

23 Q. And when you say "as it applies to landscaping,"
24 what do you mean by that?

25 A. To not exceed the provisions that I described
26 earlier, you know, not to import more than 250 cubic
27 yards, to create vertical fills and cuts greater than five
28 feet in height, 3:1. Information that he relayed to me in
saying that he'd discussed this with city staff prior to
this work beginning, that he understood. I believe I may
have advised him that he might want to obtain a haul route
permit just in the interest of neighbors expressing
concern over the activity, that it would benefit him to
have an import permit.¹⁰

29 The beginning point of the problem was scouring, siltation, sediment, and debris that occurred on
30 the Moritz property because of the Witch Creek fires and storm waters, and because of what appeared to

31 ⁹ Deposition of David Rizzuto at 14:3-14:13.

32 ¹⁰ Deposition of David Rizzuto at 19:12-20:2.

1 be a broken gravel-bag dam upgradient that dumped debris and caused flooding on the Moritz
2 property.¹¹

3 Bill Moritz checked with the City of Poway desk clerk, and understood he had the permission to
4 do the work described. He was told he needed no permit because what he was doing was contour
5 grading. So Bill Moritz began contour grading. Dave Rizzuto later personally observed the work, then
6 affirmed the City of Poway's position that the work was permissible contour grading, so Bill Moritz
7 continued grading.

8 Faced with a stop work notice on February 7 and a demand to see Sam Tadros, Bill Moritz did so
9 the following day, complying with the stop-work notice. Again he was told that what he was doing was
10 contour grading that needed no permit. Work stopped.

11 Later that day, a City of Poway inspector, Don Sharp, returned a second time, contradicting
12 what the City of Poway had told Bill Moritz earlier that day. Bill Moritz stopped work, and consulted
13 Jim Lyon as requested. This ultimately resulted in meeting at which Bill Moritz was asked to prepare a
14 sketch of his intentions, which he prepared and submitted. Thereafter, he consulted with civil engineers
15 who recommended a pipe to protect against unrestrained storm waters, and submitted a notification of
16 streambed alteration. Five days later, he received notice to immediately eliminate the problem of
17 transmitting water across the property, and understood that to be a directive to install the pipe for which
18 he had had submitted paperwork. He advised the City that this was his plan, then proceeded with the
19 work in order to comply by the City's June 2, deadline. One of the problems has been the multiplicity of
20 City of Poway personnel involved in this matter including the following: Dave Rizzuto, Jim Lyon, Sam
21 Tadros, Donald Sharp, Dennis Bechter, Thomas Borobia, Sam Arabzadeh, and others. The City of
22 Poway should be encouraged to protect the Moritzes property from unrestrained storm waters by
23 properly managing upgradient storm waters, and by being named as a discharger on the instant tentative
24 CAO.

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26
27 ¹¹ These are issues related to the City of Poway's management or mismanagement of storm waters, an issue that might later
28 be addressed by evidence from its consultant, D-Max Engineering, about whether the City properly addressed storm water
issues related to its Jurisdictional Urban Runoff Management Plan. This evidence is not available and cannot yet be
presented; the Moritzes request leave to augment the record with that information when available.

**CAO R9-2008-1052 SHOULD NOT ISSUE BECAUSE THERE
IS NO CONDITION OF POLLUTION OR NUISANCE JUSTIFYING
THE APPLICATION OF WATER CODE SECTION 13304**

Water Code section 13304 requires a finding that the discharger creates or threatens to create a condition of pollution or nuisance.¹² ""Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (A) The waters for beneficial uses. (B) Facilities which serve these beneficial uses."

Here, the Regional Board knows neither the quality of the water as it enters onto the Moritzes' property, nor the quality of the water as it exits the Moritzes' property. There is no evidence of background levels of water. Moreover, temporary exceedances are allowed under the Basin Plan. Whether the Moritzes' property affects waters of the state in any way whatsoever, let alone unreasonably affects waters for beneficial uses or facilities that serve those beneficial uses is speculative and without evidence in the record.

Here, RWQCB has no record evidence establishing a condition of pollution or nuisance. RWQCB staff Christopher Means testified as follows:

Q It's possible for people such as Dr. Moritz to change the quality of water without unreasonably affecting beneficial uses, right?

A I don't understand the question.

Q Do you know what the quality of water is, storm water is, as it enters onto Bill Moritz's property in a rain event?

A No.

Q Never measured it?

A No, I have not.

Q Do you know whether the regional board has ever done any inspection or test by which it could determine the quality of the water as it enters onto Bill Moritz's property during a rain event?

¹² (a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state **and creates, or threatens to create, a condition of pollution or nuisance**, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant. (Water Code section 13304 (a), emphasis added.)